PP v. MOHD NIZAM ABDUL KASSIM & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL TRIAL NO: 45A-5-02-2014]
31 DECEMBER 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking 266.5g cannabis – Prima facie case – Whether established – Whether second accused had requisite knowledge of drugs found in car – Contradictions in prosecution evidence – Whether benefit of doubt given to second accused – Whether mere proximity to drugs sufficient to fasten possession upon second accused – Whether 'shocked and anxious' reaction displayed by second accused sufficient to infer knowledge – Whether there was prior meeting of minds between first and second accused – Whether there was common intention – Whether prosecution failed to invoke presumption of trafficking under s. 37(da) of Dangerous Drugs Act 1952 – Evidence Act 1950, s. 8 – Penal Code, s. 34*

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking 266.5g of cannabis – Common intention – Whether established – Mere presence of accused at scene where drugs were found – Whether sufficient to raise common intention – Whether there was prior meeting of minds between first and second accused – Penal Code, s. 34*

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Trafficking in dangerous drugs – Whether second accused had requisite knowledge of drugs found in car – Contradictions in prosecution's case – Whether benefit of doubt given to second accused – Whether mere proximity to drugs sufficient to fasten possession upon second accused – Whether there was prior meeting of minds between first and second accused – Whether there was common intention – Whether prosecution failed to invoke presumption of trafficking under s. 37(da) of Dangerous Drugs Act 1952*

The second accused and the first accused were charged with trafficking in dangerous drugs, *to wit*, 266.5g of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The salient facts adduced through the prosecution's witnesses revealed that SP3, the raiding officer, had led a team of police officers to carry out a drug raid at Bangunan Persatuan Taipu on Jalan Anson, Penang ('the premises'). A black-coloured Gen 2 motor vehicle ('the said car') had entered the premises through its main gates. When the raiding team ambushed the said car, the first accused was seen seated at the driver's seat while the second accused sat in the front passenger seat. Both accused persons alighted from the said car and were arrested. The police raiding party then conducted a search and found a blue bag containing four slabs of cannabis at the back passenger leg rest behind the front passenger seat and two slabs of cannabis in the back pocket of the front passenger seat. The incriminating exhibits were seized and sent to the chemist ('SP5') for analysis where SP5 testified that all the substances analysed were cannabis. The

prosecution had successfully proven a *prima facie* case against the first accused, but failed to prove a *prima facie* case against the second accused. Accordingly, the second accused was acquitted and discharged. In so acquitting the second accused, the learned judge had, *inter alia,* deliberated on whether an inference could safely be made that the second accused had the requisite knowledge of the nature of the drugs found in the car. The charge preferred by the prosecution also invoked s. 34 of the Penal Code against both the first and second accused persons in respect of common intention.

Held (acquitting and discharging second accused):

(1) SP3 testified that as he approached the said car, he saw two Malay males sitting in the car. He identified the first accused as the driver of the said car while the second accused sat in the front passenger seat. SP3 denied in cross-examination that it was only the first accused who drove the said car into the car park and that the second accused was not in the car at the time. SP4, the investigating officer on the other hand, testified that her investigations revealed that on the day of the arrests of both accused persons, between 11 to 11.30pm, the first accused had gone to visit the second accused, who was employed as a security guard at the premises and who was working at the time, and that the second accused person then entered the car. In light of the contradiction in the prosecution evidence, the benefit of the doubt ought to be given to the second accused. Where there are two possible inferences to be drawn, the one in favour of the accused ought to be adopted. (paras 43-45)

(2) As the second accused was in the car only for a brief period of time, no fair inference could be made that he knew the presence of the drugs in the car. It was also in evidence that from where the second accused was sitting, the packages containing the drugs were not visible. No inference could also be fairly made that he had occasion to suspect the presence of the drugs in the car from the smell emitted by the drugs as he was only present in the said car for a brief period of time. There were no personal belongings of the second accused found in the car and the car was also not registered in his name. There was nothing incriminating found on the second accused and neither were there evidence of any fingerprints lifted from the packages not any DNA recovered. There was accordingly nothing in the car to connect the second accused to the drugs in question apart from his mere proximity to the drugs. Mere proximity or juxtaposition of the second accused to the drugs without more was insufficient to fasten possession upon him. (paras 49-52)

(3) SP3 testified that some of the members of the raiding party had pointed their pistols at both the accused. Any reasonable person so confronted would no doubt have displayed a 'shocked and anxious' reaction. Based upon the circumstances of this case, the reaction of the second accused was insufficient to infer knowledge on his part pursuant to the provisions

of s. 8 of the Evidence Act 1950. On the contrary, it was in evidence that the second accused had cooperated fully with the police upon his arrest. This was equally consistent with the second accused not having knowledge of the drugs in question. (para 55)

(4) The mere presence of an accused at the scene without more was insufficient to raise common intention. The benefit of the doubt was given to the second accused in respect of the contradiction between the evidence of SP3 and SP4 with regard to whether the second accused had only entered the car and remained in it for only a brief period of time before the raid. Having resolved the point in favour of the second accused and as the presence of the second accused in the car was only brief, it could not be said on the facts that there was any evidence of a prior meeting of minds or concert between the first and second accused. Therefore, there was no evidence of common intention under s. 34 of the Penal Code. (para 67)

(5) Without affirmative proof of possession, the prosecution failed to invoke the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952. The prosecution had thus failed to successfully rely upon the statutory presumption under s. 37(da). The prosecution had failed to prove trafficking on the part of the second accused based upon the evidence adduced. From a maximum evaluation of the evidence therefore, the prosecution had not made out a *prima facie* case against the second accused. (paras 68-69)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Koay Chooi v. Regina [1955] 1 LNS 41 HC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Matthew Lim v. Game Warden, Pahang [1959] 1 LNS 57 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***
Namasiyam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Pitting Hj Mohammed Ali v. PP [1978] 1 LNS 144 HC ***(refd)***
PP v. Abdul Kudus Japlus [1988] 2 CLJ 812; [1988] 2 CLJ (Rep) 170 HC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 1 LNS 8 HC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
Romi Amora Amir v. PP [2011] 1 CLJ 870 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)
Evidence Act 1950, ss. 8, 155(c)
Penal Code, s. 34

For the appellant - Latsmanan Ponnusamy; M/s Khor Gaik Thiam & Latsmanan
For the respondent - Emma Syafawati Abdul Wahab; DPP, State Legal Advisor's Office, Pulau Pinang

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] The second accused together with one Mohd Nizam bin Abdul Kassim (first accused) were charged with the following:

> Bahawa kamu bersama-sama pada 6hb Ogos 2013, jam lebih kurang 11.30 malam, di tempat letak kereta hadapan Bangunan Persatuan Taipu, 33, Jalan Anson, 10400 Pulau Pinang, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu seberat 266.5 gram cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Bebahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] Translated, the charge reads as follows:

> That you together on 6th August 2013 at about 11.30pm at the car park in front of the Taipu Association Building, 33, Jalan Anson, 10400 Penang, in the North East District, in the State of Penang, did traffic in dangerous drugs *to wit*, 266.5 grams of cannabis and you have therefore committed an offence under section 39B(1)(a) Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act read together with section 34 of the Penal Code.

[3] At the end of the prosecution case, I held that the prosecution had successfully proven a *prima facie* case against the first accused and I called for the defence of the first accused. I however held that the prosecution had failed to prove a *prima facie* case against the second accused and accordingly acquitted and discharged him without calling for his defence. The prosecution being aggrieved has filed an appeal against the decision to acquit and discharge the second accused, Md Dzoni bin Md Hanifah and accordingly, this judgment only addresses the grounds in support of the decision to acquit and discharge the second accused at the end of the prosecution case. The case against the first accused at the time of this judgment is still pending.

Prosecution Case

[4] The salient facts as adduced through prosecution witnesses revealed that SP3, ASP Lim Wei Yih, who was the raiding officer led a team of police officers from JSJN, IPK Penang after a briefing, to carry out a drug raid on 6 August 2013 at Bangunan Persatuan Taipu, No. 33 Jalan Anson, Penang, hereinafter the 'said premises'. SP3 and his team arrived at the said premises around 11pm. They took up positions at the car park of the said premises. They waited and conducted surveillance on the said premises.

[5] At about 11.30pm, a black coloured Gen 2 motor vehicle bearing registration number PJQ 1485, hereinafter the 'said vehicle or car', entered the premises through its main gates and came to a halt at a place marked 'Y' in photographs exh. P13 (e) and (f). According to SP3, as soon as the said vehicle came to a halt, he instructed his team to ambush the said vehicle.

[6] As he approached the vehicle, SP3 said he saw two male Malays who were the first and second accused respectively seated in the said vehicle. The first accused was seated at the driver's seat while the second accused sat in the front passenger seat. SP3 said the place was well lit and the visibility was good. SP3 introduced himself to both accused. At the time of ambush and arrest, SP3 and his officers who were in plain clothes, produced their firearms and aimed their guns at both accused who were still in the said vehicle. The car ignition was still on when the said raid was conducted in respect of the said vehicle. Both the accused according to SP3 were in a state of shock and panic ("terkejut dan cemas").

[7] Both accused then alighted from the said vehicle and were arrested. The police raiding party then conducted a search and found the following in the said vehicle;

(i) a blue bag (exh. P4) with the word 'Systemax' written on it containing four slabs of cannabis found at the back passenger leg rest behind the front passenger seat.

(ii) two slabs of cannabis in the back pocket of the front passenger seat.

[8] SP3 testified that he also recovered the first accused's work pass (exh. P21) in the back pocket of the front passenger seat together with the two slabs of cannabis.

[9] The four slabs of cannabis found in exh. P4 were produced in court and marked as exh. P24. Their net weight was 171.8g. The two slabs found at the back pocket of the front passenger seat were produced and marked as exh. P27. The two slabs weighed 94.7g nett. The nett weight of all six slabs formed the total weight which made up the subject matter of the charge amounting to 266.5g of cannabis.

[10] All six slabs of cannabis were wrapped with a few layers of transparent plastic and cellophane tape. Exhibit P4 was folded and placed at the leg rest of the back passenger seat. Exhibit P4 could be seen from the outside but its contents was not visible. The two slabs at the back pocket of the passenger seat were also not visible.

[11] SP3 testified that when he arrested the accused, body checks were done and plant – like substance was also recovered from the underwear worn by the first accused. The first accused was also initially charged in the Magistrate Court for drug possession recovered from his underwear. The prosecution however, decided not to proceed with the said charge.

[12] After the arrest, the incriminating exhibits were seized and both accused were brought to the Ibu Pejabat Kontinjen Pulau Pinang for further action. All the exhibits including the car registration number PJQ 1485 were then handed over to the investigation officer, SP4. SP4 sent the exhibits recovered to the chemist for analysis. SP5, the chemist, testified that all the substances analysed were cannabis weighing 266.5g nett.

[13] Investigations revealed that the said vehicle was registered in the name of Khairul Ummaa binti Abdul Razak, the late wife of the first accused.

Impeachment Proceedings

[14] During the course of the prosecution case, application was made by the prosecution to commence impeachment proceedings against two witnesses called by them, namely, SP6 and SP7 respectively.

SP6

[15] SP6, Shahririzal bin Abdul Razak, is the brother-in- law of the first accused. His late sister, in whose name the said car bearing registration no. PJQ 1485 was registered, and in which the impugned drugs were found, was married to the first accused. During the course of examination in chief, he testified that he had used the said car before the incident. He said that he had used the car around two or three times around the month of August 2013. He testified that he last used the said car on 6 August 2013.

[16] However, in his statement (exh. P37), in reply to a question whether he had ever used the car after July 2013, replied in the negative as he said that at the time he was imprisoned for an offence until March of 2014.

[17] As a result of this, learned Deputy Public Prosecutor (DPP), applied to the court to commence impeachment proceedings against SP6 pursuant to s. 155(c) of the Evidence Act 1950. The witness statement of SP6 (P37) was accordingly submitted by the prosecution to the court for inspection of the portions said to be at variance with his oral testimony. After perusing the relevant parts of the statement (P37), and comparing it to the oral testimony of SP6, and in accordance with the time honoured principles as laid out in the case of *Muthusamy v. PP* [1947] 1 LNS 71; [1948] 1 MLJ 57, I allowed the application to commence impeachment proceedings as I was of the view that the differences amounted to material contradictions.

[18] SP6 was accordingly asked whether he had made the statement (P37). He confirmed that P37 was the statement he gave to the police. The statement was therefore proven to be his statement. He explained that although the questions asked in the statement were true, the answers given by him were not. Initially, he said that after the statement was printed out, he had merely

signed the statement without looking at it. Later in cross-examination, he said that the signature on the statement was not his. Later still, he however identified the statement shown to him from his signature. During cross-examination, SP6 testified that what he had told the court was the truth and not what was contained in his statement (P37). SP6 further said that no caution was administered to him before the recording of his statement nor was he allowed to make any amendments to the statement.

[19] SP6 further testified during cross-examination that there were actually two officers involved in the recording of his statement (P37), namely, SP4, Inspector Jaswit Kaur who was the investigating officer of the case, and one Inspector Dharmaseelan. Inspector Dharmaseelan was not called by the prosecution. The prosecution however, recalled SP4 and she testified that the recording of P37 was done at the residence of SP6. She testified that although she brought along Inspector Dharmarseelan for her safety, it was she who recorded P37 and not Inspector Dharmarseelan. SP4 testified that although Inspector Dharmaseelan spoke to SP6 it was about other things which had nothing to do with the case. She also testified that she had administered the statutory caution to SP6 before recording his statement in Bahasa Malaysia, which he understood. I was satisfied after hearing the testimony of SP4 that it was she who had recorded the statement (P37) from SP6. I therefore hold that the prosecution had successfully proven in evidence the statement of SP6 (P37). I was also satisfied that SP4 had administered the requisite caution to SP6 before the recording of P37.

[20] The two conflicting versions were explained to SP6 and he was given a full and fair opportunity to explain the difference. To a question posed by the DPP as to why in court, SP6 had said that after his sister-in-law passed away, her family as well as his brother used the car whereas in his statement he said that it was only his brother who had used the car, SP6 replied that he could not remember the answer to the question as the incident happened long ago. He also said that he was working and did not always stay with his brother. He said that he lived apart from his brother and was often overseas due to work commitments. As alluded to earlier, he had also explained that although the questions asked in the statement were true, the answers given by him were not. He said that after the statement was printed out, he had merely signed the statement. He said he was not allowed to read over his statement. He admitted the signature on the statement was his. He identified the statement shown to him from his signature. SP6 testified that what he had told the court was the truth and not what was contained in his statement (P37). SP6 further said that no caution administered to him before the recording of his statement nor was he allowed to make any amendments to the statement.

[21] In reply to a question as to why the difference between his oral testimony and his statement with reference to the use of the car, he said on 30 May 2013, he was arrested for testing positive for a urine test but after one month, he was bailed for RM2,000. After that he last used the car on 6 August 2013. On 26 August 2013 he said was arrested for a criminal case.

SP7

[22] SP7, Ahmad Nasrun bin Abdul Kassim is the brother of the first accused. He testified in court in response to a question posed in examination-in-chief as to who had used and held the keys to the said car after his sister in law passed away, that his brother and the family of his sister-in-law held one set of the keys each to the car and both had used the car. In his statement (exh. P38) given to the police however, SP7 said that his brother was the only one who used the said car and that the keys to the car as well as the spare key were kept by his brother.

[23] In the face of this contradiction, the DPP once again applied to the court to impeach the credibility of SP7. After the relevant parts in the statement was shown to me, I found that the differences between SP7's evidence in court and his statement amounted to a material contradiction. I accordingly allowed the prosecution's application to impeach SP7's credibility. SP7 was given an opportunity to explain the contradiction.

[24] SP7 explained that he could not recollect the questions asked as it was a long time ago. He said that he did not stay with his brother and that he is always overseas because of work. SP7 said that it was only after he gave the statement that he remembered that the investigating officer had asked him for the spare key. He then went home to look for it but in vain. He then made a call to the family of his sister-in-law and discovered that they had the spare key. He said it was them who returned the spare key to the investigating officer and at the time he was overseas.

[25] SP4 Inspector Jaswit was recalled and she confirmed that she had recorded the statement P38 from SP7 and that she had administered the warning to him under s. 112 of the CPC. She also positively identified both her signature and that of SP7 in P38 and gave him the opportunity to make any amendments or additions to the statement but he did not avail himself of this. I was satisfied that the statement P38 was proven in evidence.

[26] After hearing the impeachment proceedings and the respective explanations form both SP6 and SP7 as to the contradictions I suspended the assessment of their credibility until I could assess it together with the rest of the evidence at the appropriate stage. See *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 and also *PP v. Abdul Kudus Japlus* [1988] 2 CLJ 812; [1988] 2 CLJ (Rep) 170; [1988] 3 MLJ 310.

Duty Of The Court At The End Of The Prosecution Case

[27] Section 180(1) of the Criminal Procedure Code stipulates the duty of the court at the end of the prosecution case. It reads as follows:

> 180. Procedure after conclusion of case for prosecution
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> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[28] Section 180(1) of the Criminal Procedure Code (CPC) stipulates that when the case for the prosecution is concluded the court shall consider whether the prosecution has made out a *prima facie* case against the accused. The duty upon the court at that stage has also been the subject of judicial consideration in the cases of *PP v. Dato' Seri Anwar Ibrahim* (No. 3) [1999] 2 CLJ 215; [1999] 2 AMR 2017; [1999] 2 MLJ 1, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203, respectively. They are all united in the stand that they take, and that is the evidence at the close of the case for the prosecution must be subjected to maximum evaluation in order to determine whether a *prima facie* case is made out that would justify a court in calling for the defence of the accused. The phrase "*prima facie* case" itself has not been statutorily defined in the above sections. However, it has been the subject of judicial pronouncement. In the case of *Dato' Seri Anwar Ibrahim (supra)*, His Lordship Augustine Paul J (as he then was) had this to say on the meaning of the phrase "*prima facie* case":

> The meaning of *prima facie* case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A *prima facie* case arises where the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a *prima facie* case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) ... thus, a *prima facie* case as prescribed by the new section 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

[29] In *Looi Kow Chai v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal had this to say:

> In our respectful view, the correct test to be applied in determining whether a *prima facie* case has been made out under s. 180 of the CPC (and this would apply to a trial under s. 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 1 CLJ 138; ([1983] CLJ (Rep) 721) HC p. 152 (p. 752 g):
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> > To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.
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> We are confident in the view we have just expressed because we find nothing in the amended s. 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.
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> *It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.* (emphasis added)

[30] It is therefore evident that the expected standard to which a trial court should hold the prosecution to is that of a maximum evaluation of the evidence of all their witnesses. This exercise necessarily involves the court in subjecting all the evidence of the prosecution's witnesses to strict curial scrutiny. The credibility of the testimony of all the witnesses for the prosecution must be scrutinised and evaluated with a fine toothcomb. Should more than one inference arise as a result of this exercise, the one favourable to the accused must be adopted. The analysis of the evidence led by the prosecution proceeded in the light of the foregoing principles.

Evaluation Of The Prosecution's Case

Ingredients Of The Offence Of Trafficking

[31] In order for the prosecution to make out a *prima facie* case in respect of the charges against the accused, it is incumbent on them to prove the following ingredients. Firstly, that the drugs are dangerous drugs within the meaning and definition of the Dangerous Drugs Act 1952 (DDA). Secondly, that the accused was in possession of the impugned drugs. Thirdly, that the accused was trafficking in the drugs.

The Drugs Are Dangerous Drugs Within The Meaning And Definition Of The DDA

[32] The chemist, SP5, testified that from her analysis of the exhibits received by her, she confirmed it to be 266.5g of cannabis as defined under s. 2 of the DDA.

[33] The Federal Court case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 held as follows:

> We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of the substance, the Court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into the details of what he did in the laboratory, step by step.

[34] I find that the evidence of SP5 was not inherently incredible. Despite the challenge made as to the methods of her analysis, SP5's evidence was unshaken. In the circumstances of the case and guided by the authority referred to, I find that the prosecution had proven that the drugs seized were of the type, nature and weight as testified to by SP5 and as confirmed in the chemist's report, P31.

The Accused Was In Possession Of The Said Drugs

[35] The prosecution submitted that there was sufficient evidence adduced to prove knowledge and custody, control and possession on the part of both accused. The manner in which the evidence was adduced and the tenor of their submissions also made it clear that they were not seeking to rely on presumed possession under s. 37(d) of the DDA but were seeking to prove actual or direct possession on the part of both accused.

[36] In a charge of trafficking in dangerous drugs, possession is the most important ingredient. Unless there is direct evidence of trafficking, it is a necessary step towards proving trafficking. The prosecution can prove "possession" either by direct evidence or employing in aid the presumption under s. 37(d) of the Dangerous Drugs Act 1952 (DDA).

[37] In relation to proof of direct possession, the law was taken as settled as early as 1949 that possession in order to incriminate a person, must have the following characteristics:

(a) the possessor must know the nature of the thing possessed;

(b) he must have a power of disposal over it; and

(c) he must be conscious of his possession of the thing.

[38] See *Toh Ah Loh And Mak Thim v. Rex* [1948] 1 LNS 72; [1949] MLJ 54.

[39] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 1 MLJ 28, Taylor J explained "possession" as follows:

> The word "possession" is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge.

[40] In *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237, Thompson J said:

> …. "possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition pg 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. *The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case*. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there

must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. (emphasis added)

[41] In *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 1 LNS 8; [1994] 2 MLJ 576, possession was discussed in the following manner:

Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that; (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA.

[42] In the case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337; [2007] 5 MLJ 1, the impugned drugs were found, as in the instant case, in a car which the accused was driving when he was arrested. The Federal Court held *inter alia* the following:

Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v. Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge.

[43] Applying the above principles to the facts of the instant case, can an inference be safely made that the second accused had the requisite knowledge of the nature of the drugs found in the car? SP3, the raiding officer, testified that after an observation lasting for about 30 minutes, he saw the car bearing Registration No. PJQ 1485 enter the car park in front of the Taipu Association Building and come to a halt with the engine still running. As he approached the said car he testified that he saw two male Malays sitting in the car. He said that the lighting there from the street lamps shone and lit up the area and he was able to see therefore.

[44] He identified the first accused as the driver of the said car while the second accused he said sat in the front passenger seat. SP3 steadfastly denied in cross-examination that it was only the first accused who drove the said car into the car park and that the second accused was not in the car at the time. He further denied that it was only after the second accused entered the car that the raid took place.

[45] SP4, the investigating officer, on the other hand, testified that her investigations revealed that the first accused went to visit the second accused between 11 to 11.30pm on 6 August 2013 which was the day of the arrests of both accused. She also said that based on what the complainant (operations officer) said, the second accused then entered the car. This was at variance with the testimony of SP3 on this point. SP4 was never re-examined on this issue. In the light of the contradiction in the prosecution evidence therefore,

A the benefit of the doubt ought to be given to the second accused. That where there are two possible inferences to be drawn, the one in favour of the accused ought to be adopted is too trite to avail of the need to cite any authority in support thereof. Evidence was also tendered and suggestion put by the defence that the second accused was employed as a security guard at
B the premises where the raid took place and that he was working during that time.

[46] In support thereof the second accused tendered in evidence exhibit (D36) which was a letter dated 11 October 2014 from Jerai Securities Sdn Bhd who is the employer of the second accused. The said letter D36
C evidenced that the second accused was employed by Jerai Securities Sdn Bhd, his working hours on 6 August 2013 commenced at 7pm and ended at 7am at One Academy, Anson Road, Penang which the defence contended was an educational establishment at the Taipu Building (Bangunan Taipu) which was the place where the second accused was apprehended whilst in the
D car with the first accused. The said letter D36 further confirmed that the second accused was arrested on 6 August 2013 at 11.15pm. SP4 agreed also that since the second accused was arrested during working hours he could have been in his uniform at the time.

[47] It is to be observed here that the prosecution had not taken any steps
E to subpoena the employer of the second accused nor did they make any attempt to investigate as to the availability of any CCTV recordings at the material time at the place of arrest at the Taipu Building.

[48] As the second accused was in the car only for a brief period of time, no fair inference can be made that he knew the presence of the drugs in the
F car. It was also in evidence that from where the second accused was sitting, the packages containing the drugs were not visible. No inference can also be fairly made that he had occasion to suspect the presence of the drugs in the car from the smell emitted by the drugs as he was only present in the car for a brief period of time. It was also in evidence that the drugs were tightly
G wrapped in layers which would of course considerably reduce the emission of any odour.

[49] Even if the smell had aroused his suspicions, there was no opportunity given the short interval of time before the raid for the second accused to have made any inquiries and/or react to the situation. There were no personal
H belongings of the second accused found in the car and the car was also not registered in his name. There was nothing incriminating found on the second accused and neither were there evidence of any fingerprints lifted from the packages nor any DNA recovered. There was accordingly nothing in the car to connect the second accused to the drugs in question apart from his mere
I proximity to the drugs for a brief moment of time.

Proximity To The Drugs

[50] In respect of the mere proximity of the second accused to the drugs, the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561 held as follows:

> We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that the evidence against him in relation thereto was, essentially, of juxtaposition. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring control or even custody of the containers concerned sufficient to attract the presumption under s. 37(d). Accordingly, on this ground alone, the learned judge was perfectly entitled to rule, at the close of the case for the prosecution, that the respondent had no case to answer and to acquit and discharge him. (emphasis added)

[51] In *Romi Amora Amir v. PP* [2011] 1 CLJ 870; [2011] 4 MLJ 571 the court said:

> Unless knowledge is proved, an item however close to a person, could just be miles away.

[52] It is therefore clear that mere proximity or juxtaposition of the second accused to the drugs without more is insufficient to fasten possession upon him.

Reaction Of The Second Accused

[53] With respect to the reaction of the second accused who along with the first accused was stated by SP3 as being "terkejut dan cemas" or "shocked and anxious", at the time of the raid, it must be remembered that according to the evidence of SP3, in cross-examination he testified that some of the members of the raiding party had pointed their pistols at both accused. Any reasonable person so confronted would no doubt have displayed similar reaction.

[54] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19, it was held by the Federal Court as follows:

> The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s. 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s. 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required.

[55] I therefore find that based upon the circumstances of this case, the reaction of the second accused as testified to by SP3 without more, is insufficient to infer knowledge on his part pursuant to the provisions of s. 8 of the Evidence Act 1950. On the contrary it was in evidence that the second accused had cooperated fully with the police upon his arrest. This is equally consistent with the second accused not having knowledge of the drugs in question.

Ruling In Respect Of The Impeachment Proceedings Against SP6 And SP7

[56] The ruling in respect of the impeachment proceedings is to be assessed as a whole together with the rest of the evidence at the appropriate stage which here is at the close of the prosecution case. See *Dato' Mokhtar Hashim & Anor v. PP* (*supra*) and also *PP v. Abdul Kudus Japlus (supra)*. In *Pitting Hj Mohammed Ali v. PP* [1978] 1 LNS 144; [1979] 2 MLJ 136, it was held that while it is for the witness to explain the alleged discrepancy it is for the court to consider whether or not the explanations given are satisfactory. After considering all the evidence adduced by the prosecution, I thus proceeded to assess and evaluate whether the explanation given by the witnesses SP6 and SP7 together with all the other prosecution evidence may have saved their credit.

SP6

[57] After hearing the explanation of SP6 with regard to the contradictions between his testimony in court and the relevant portions in his statement (P37), I rule that the testimony of SP6 has been successfully impeached. The questions posed to SP6 in P37 were simple questions and put forward in a straightforward manner. The subject matter posed to SP6 in P37 related to his use of the said car and when was the last occasion he had used it. It called for a straightforward answer. SP6 could have by no means have been misled by the questions posed. Similarly, the questions posed to him in court were simple and straightforward in nature. All it needed was a response as to when he had last used the car. The demeanour of SP6 in court did not exactly inspire confidence and he did not come across as a simpleton who was utterly confused as to the answers required of him. His dismal attempt to explain away the contradictions by alluding to his arrest on 30 May 2013 and subsequent bail after a month was clearly an afterthought. The differences between the two versions were so great as to be irreconcilable and they related to a material ingredient of the charge against the accused persons. His explanation for the contradictions under the circumstances cannot be accepted.

SP7

[58] I found that the questions posed to SP7 were fairly straightforward and uncomplicated. It was fairly obvious that from his testimony in court and from the observation of his hesitant demeanour that he wanted to assist his brother's defence. The contradiction was stark in nature and the attempt to explain the difference did not remedy or repair his credibility. The

contradiction here was also in relation to a material ingredient of the charge. Therefore, I am constrained to hold that the credibility of SP7 has been successfully impeached by the prosecution.

[59] As I have found that the evidence of both SP6 and SP7 has been impeached, I now had to proceed to decide the effect of such impeachment. In *Matthew Lim v. Game Warden, Pahang* [1959] 1 LNS 57; [1960] 1 MLJ 89 it was held:

> Once this has been done and it is proved that the previous statement when compared with the evidence given in Court contains material inconsistencies the witness's credit is impeached and his evidence becomes worthless because the witness himself has been shown to be unworthy of credit.

[60] In *Koay Chooi v. Regina* [1955] 1 LNS 41; [1955] 1 MLJ 209, it was held:

> What is perhaps more important is that this witness having been discredited by proof of an entirely inconsistent statement to the Police the learned Magistrate appears to have given some weight to his evidence, which in my opinion he should not have done.

[61] See also *PP v. Munusamy* [1980] 1 LNS 63; [1980] 2 MLJ 133.

[62] In accordance with the above authorities that the evidence of a successfully impeached witness becomes worthless, I therefore hold that the evidence of both SP6 and SP7, as they had been successfully impeached, have been rendered worthless and therefore I have not taken into consideration their testimony in the evaluation of the prosecution case. From the available evidence it could not be inferred that the second accused had the requisite knowledge which was a necessary prerequisite to a finding of possession that incriminates.

Non-production Of The Gen 2 Motor Vehicle Registration No. PJQ1485

[63] The prosecution had failed to produce the abovementioned motor car for identification during the course of the trial. According to SP4, the investigating officer, the car was lost while kept at the back of the IPD compound, north east district. SP4 only realised that the car was missing after nine months. Counsel for the second accused therefore submitted that as the car is a very important piece of evidence, whatever is located inside the car will only translate into factual reality if the car is produced for the inspection of the court and marked as an exhibit.

[64] As against the argument of learned counsel for the second accused are the following facts however. Photographs exh. P8 (A-E) which were the photographs of the said car were produced in court. SP1 (the storekeeper) testified that he received the said car from SP4 on 13 August 2013. The handover of the said car was evidenced by a handover acknowledgement list (P3). SP1 had registered the car as an exhibit in POL 261(P7) under the registration no. 688/13. After registration, the said car was kept in the compound of the IPD north east district.

[65] SP3 in his evidence had also identified the said car from exhibit P8 (A-E) as the car occupied by the first and second accused at the time of the raid. SP3 had also issued a search list (P19) in respect of the said car and also prepared a handover acknowledgment list (P20) in the course of handing over the said car to SP4. In the premises I am satisfied that the said car was sufficiently identified from the photographs produced (P8 (A-E)) and the identity of the car had been proved from the evidence of the search and handover lists above. The absence of the said car therefore has not prejudiced the prosecution case. I find as a consequence no merit in the submissions of the learned counsel for the second accused in this respect.

Common Intention Under s. 34 Of The Penal Code

[66] The charge preferred by the prosecution also invoked s. 34 of the Penal Code against both the first and second accused in respect of common intention. Section 34 of the Penal Code provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone. The Supreme Court in *Namasiyam Doraisamy v. PP v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336 at p. 344 observed that:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> It has been also held that common intention can develop on the spot or at the scene so to speak. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (*The Supreme Court (of India) on Criminal Law* 1950-1960 by JK Soonavala pages 188 to 193).

[67] While all of the above may be true, it cannot be the case that mere presence of an accused at the scene without more is sufficient to raise common intention. As can be gathered from *Namasiyam*'s case (*supra*), there must be a prior meeting of minds and prior concert of some sort. On the facts as alluded to above, the benefit of the doubt was given to the second accused in respect of the contradiction between the evidence of SP3 and SP4 with regard to whether the second accused had only entered the car and remained in it for only a brief period of time before the raid. Having resolved the point in favour of the second accused and as the presence of the second accused in the car was only brief, it cannot be said on the facts that there was any

evidence of a prior meeting of minds or concert between the first and second accused, there being no evidence of any discussion between the two prior to the first accused proceeding to the car park. I therefore hold that there was no evidence of common intention under s. 34 of the Penal Code.

The Accused Was Trafficking In The Drugs

[68] Without affirmative proof of possession, the prosecution has also failed to successfully invoke the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952. See *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273, where the Federal Court held:

> *Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed … trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, proof of the relevant minimum quantity specified).* (emphasis added)

[69] In order therefore for the prosecution to invoke the presumption under s. 37(da), an affirmative finding of possession must first have been made out. As this has not been the case here as evident from what was earlier held, I hold that the prosecution has thus failed to successfully rely upon the statutory presumption in s. 37(da). Without the aid of the statutory presumption under s. 37(da), I find that the prosecution has failed to prove trafficking on the part of the second accused based upon the evidence adduced.

[70] From a maximum evaluation of the evidence therefore, I find that the prosecution had not made out a *prima facie* case against the second accused and I therefore acquitted and discharged him without calling for his defence.